In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-6942

ENSIO RUBEN LAKESIDE,

Petitioner,

v.

STATE OF OREGON,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of Oregon

BRIEF FOR RESPONDENT

JAMES A. REDDEN
Attorney General of Oregon
AL J. LAUE
Solicitor General
THOMAS H. DENNEY
Assistant Attorney General
State Office Building
Salem, Oregon 97310
Phone: (503) 378-42[illegible]
Counsel for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Cited

Statutes

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-6942

ENSIO RUBEN LAKESIDE,

Petitioner,

v.

STATE OF OREGON,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of Oregon

BRIEF FOR RESPONDENT

OPINIONS BELOW

Petitioner's statement is accepted.

JURISDICTION

Petitioner's statement is accepted.

QUESTION PRESENTED

Does the giving of a jury instruction in a criminal case, over the defendant's objection, that no inference may be drawn from the fact that the defendant did not testify violate either the privilege against self-incrimination guaranteed by the Fifth Amendment or the right to assistance of counsel guaranteed by the Sixth Amendment?

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner's statement is accepted.

STATEMENT OF FACTS

Petitioner's statement of facts is accepted.

SUMMARY OF ARGUMENT

This Court has previously indicated, in *Bruno v. United States,* 308 U.S. 287 (1939), that the giving of a jury instruction that no inference is to be drawn from the fact that the accused in a criminal case did not testify does not violate the privilege against self-incrimination, and that whether or not such an instruction shall be given is not a question of Constitutional dimensions. Nothing in *Griffin v. California,* 380 U.S. 609 (1965), suggests otherwise, and this Court should so hold expressly. To hold otherwise suggests an unwarranted lack of faith in the jury's ability to draw no inference from the accused's silence and unnecessarily diminishes the function of the trial judge, by removing from him, and giving to the accused, the right to determine how the jury should be instructed on a particular subject.

Assuming, arguendo, that petitioner's Sixth Amendment claim is properly before the Court, it should be rejected. The accused's Constitutional right to have the assistance of counsel in formulating and exercising his trial strategy does not extend so far as to give him total control over the manner in which the jury is to be instructed concerning the consequences of that strategy, and it should not be so extended here.

ARGUMENT

I

Respondent has relatively little to add to the extensive opinion of the Oregon Supreme Court in this case, rejecting petitioner's claim that the Self-Incrimination Clause of the Fifth Amendment entitles the accused in a criminal case to prevent the trial judge from instructing the jury to draw no inference of guilt or innocence from the fact that the accused did not testify, even though the judge believes the instruction necessary. However, some additional argument may be in order concerning the two previous decisions of this Court which bear most directly on the issue.

In *Bruno v. United States,* 308 U.S. 287 (1939), the Court held that the accused in a federal criminal case is entitled, upon request, to have the jury instructed, in substance, that no inference is to be drawn against him from the fact that he did not testify. While it appears that counsel for Bruno argued that such an instruction was required not only under federal statute, but also under the Fifth Amendment (see 308 U.S. at 288), the Court's opinion seems to be based solely on its construction of the statute (then 28 U.S.C. § 632, now 18 U.S.C. § 3481) making the defendant in a federal criminal case a competent witness in his own behalf. And while the Government argued that such an instruction was properly refused, because if given,

it would have prejudiced Bruno by calling the jury's attention to the fact that he had not testified (see 308 U.S. at 290), the Court, speaking through Mr. Justice Frankfurter, said (a) that the defendant "should be allowed to make his own choice [of whether or not to assume that risk] when an Act of Congress authorizes him to choose" (308 U.S. at 294), and (b) that the Court was not prepared to make

> "a dogmatic assumption that jurors, if properly admonished, neither could nor would heed the instructions of the trial court that the failure of an accused to be a witness in his own cause 'shall not create any presumption against him.' " (*Id.*).

We note in passing that, unlike the instruction requested in *Bruno,*[1] the instruction given in the present case does not use the word "failure," or any similar verbiage which arguably might suggest that there is a duty on the part of the accused which he has somehow "failed" to discharge. Instead, it speaks of an "option" which the defendant may or may not exercise as he "chooses" (see Pet. Br. 4; App. 4), and thus would appear to be more neutrally worded, and therefore preferable, to the precise instruction considered in *Bruno.*

---

[1] "The failure of any defendant to take the witness stand and testify in his own behalf, does not create any presumption against him; the jury is charged that it must not permit that fact to weigh in the slightest degree against any such defendant, nor should this fact enter into the discussions or deliberations of the jury in any manner." 308 U.S. at 292.

More importantly, we submit that, in the context of the present case, *Bruno* suggests, if it does not hold, that (a) the giving of an instruction that no inference is to be drawn from the fact that an accused did not testify cannot be said to infringe upon the privilege against self-incrimination, because it should not be assumed that a jury is incapable of following such an instruction, and (b) the extent to which the accused may have control over whether or not such an instruction shall be given is also not a matter of Constitutional right, but a matter which is subject to regulation, either by the courts of a particular jurisdiction or by a statute thereof, such as present 18 U.S.C. § 3481.

In *Griffin v. California,* 380 U.S. 609 (1965), the Court, speaking through Mr. Justice Douglas, held that

> "the Fifth Amendment, in its direct application to the Federal Government, and in its bearing on the States by reason of the Fourteenth Amendment, forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt." 380 U.S. at 615.

The Court expressly noted that it was reserving decision

> "on whether an accused can require, as in *Bruno v. United States,* 308 U.S. 287, that the jury be instructed that his silence must be disregarded." (*Id.* at n. 6).

Necessarily, it would seem, the Court also reserved

decision on the question of whether the accused can, as a matter of Constitutional right, *prevent* such an instruction from being given.

The resolution of petitioner's Fifth Amendment claim in the present case depends, it would seem, upon the breadth to be given to the Court's holding in *Griffin*. If, as some courts have reasoned (we think correctly), *Griffin* holds, in this context, only that the Fifth Amendment prohibits the giving of an instruction which tells the jury that they may infer guilt from the accused's silence, an instruction which tells the jury to draw no such inference is not only proper, but even beneficial to the accused. If, on the other hand, *Griffin* is to be understood broadly, as giving the fullest possible meaning to the accused's privilege against self-incrimination, it can be argued that *Griffin* confers upon the accused the right to decide whether or not any mention should be made, in any context, of his failure to testify. We submit that the latter view is not sound Constitutional doctrine and should not be adopted by this Court. In doing so, we hasten to point out that we are not arguing the wisdom, as a matter of any given jurisdiction's policy, of giving the accused his choice as to whether or not to have the jury instructed that no inference should be drawn from his silence. We are only arguing that such a policy is not mandated by the Constitution.

At bottom, the view that the privilege against self-incrimination confers upon the accused the right to decide whether or not a jury instruction shall be given concerning his failure to testify necessarily rests upon the premise, whether spoken or unspoken, that any instruction which calls the jury's attention to the fact that the accused has not testified, no matter how favorably to him the instruction may be worded, may cause the jury to draw inferences adverse to him, and that the accused in any particular case is therefore entitled, as a matter of Constitutional right, to decide whether the instruction should be given.

This premise should not be adopted. Viewed from one standpoint, it expresses a lack of trust in the jury system that has seldom been acknowledged openly by any court. It assumes that a jury cannot, or will not follow an instruction given to it. The suggestion that such an assumption is applicable to the instruction challenged in this case was, we submit, explicitly rejected by this Court in *Bruno v. United States,* supra, and we submit that the Court should not adopt it now. While this Court has doubted, since *Bruno* was decided, that a jury can follow an instruction to consider certain evidence as bearing on the guilt of one co-defendant, but disregard that evidence as to another,[2] its subsequent decision holding that a jury can follow

[2] *Bruton v. United States,* 391 U.S. 123 (1968).

an instruction that the statements of counsel are not evidence and should therefore be disregarded[3] is more in accord with the basic faith in the jury on which our judicial system rests. A similar holding is in order here.

Viewed from another standpoint, a holding that the Fifth Amendment entitles the defendant or his counsel, and no one else, to decide whether or not the jury should be instructed concerning the accused's failure to testify would remove from the trial judge a portion of his function as a neutral arbiter and give it to one of the two sides contending against each other as adversaries. We submit that diminishing the function of the trial judge is not desirable as a matter of general policy, and that the need for doing so in this specific area has not been demonstrated by petitioner.

II

In addition to his Fifth Amendment claim, petitioner argues that the Right-to-Counsel Clause of the Sixth Amendment guarantees the accused in a criminal case, or his counsel, the right to decide, as a matter of trial strategy, not only whether or not the accused will testify, but also whether or not the jury should be instructed concerning the accused's failure to testify, and that any action taken by the trial judge contrary to the accused's desires on the latter point

[3] *Frazier v. Cupp*, 394 U.S. 731, 735 (1969).

therefore interferes with the accused's Constitutionally protected right to counsel. As petitioner acknowledged in his petition for rehearing in the Oregon Supreme Court (App. 27-28), he did not make this claim in his brief in the state appellate courts, but urged it for the first time on oral argument before the Oregon Court of Appeals. Neither that court nor the Oregon Supreme Court specifically addressed this claim, possibly because of the courts' rules against noticing contentions not fairly raised in the trial court and set forth in the briefs of the parties. *Cf. State v. Hickmann,* 273 Or. 358, 540 P.2d 1406 (1975).[4] For this reason, we do not concede that petitioner's Sixth Amendment claim is properly before this Court. In any event, however, the claim should be rejected.

The gist of petitioner's Sixth Amendment argument seems to be that any trial court ruling which interferes with defense counsel's tactics or strategy deprives the accused of the effective assistance of counsel, to the extent of that interference and to the extent that the interference is erroneous. This reason-

[4]In *Hickmann,* the State appealed from an order suppressing evidence. The court of appeals vacated the order and remanded the case to the trial court for findings of fact concerning whether or not defendant consented to the police entry into his home, a ground not relied upon by the State as a basis for upholding the search in either the trial court or the court of appeals. The supreme court reversed, on the ground that, except where important considerations of public policy may be involved, a case on appeal should be heard on the same theory as that upon which it was presented in the court below.

ing would make a Sixth Amendment issue of every trial court ruling adverse to every defendant represented by counsel in a criminal case.

Such is not the law, and neither of the cases of this Court on which petitioner primarily relies for this proposition supports such a rule. It is one thing to interfere with an accused's right to choose when, and if, to testify, as did the statute struck down in *Brooks v. Tennessee,* 406 U.S. 605 (1972), or with an attorney's right to confer with his client, as did the judge's order condemned in *Gedders v. United States,* 425 U.S. 80 (1976). It is quite another to make the accused or his counsel, rather than the judge, the arbiter of how the consequences of the accused's choice of trial strategy are to be explained to the jury, or otherwise dealt with in the courtroom. The Right-to-Counsel Clause of the Sixth Amendment does not extend to the latter, and should not be so extended under the circumstances of this case.

CONCLUSION

For the above reasons, the judgment of the Supreme Court of the State of Oregon should be affirmed.

Respectively submitted,
JAMES A. REDDEN
Attorney General of Oregon
AL J. LAUE
Solicitor General
THOMAS H. DENNEY
Assistant Attorney General
Counsel for Respondent

December 1977